No. 604

In the Supreme Court of the United States

October Term, 1936

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v.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OCTOBER TERM, 1936

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REGINALD P. RAY, PETITIONER

v.

THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The *per curiam* opinion of the Circuit Court of Appeals on petition for rehearing and motions for reargument (R. 29–31) is reported in 86 F. (2d) 942.

JURISDICTION

The judgment sought to be reviewed was entered December 4, 1936 (R. 18). A petition for rehearing and motion for reargument (R. 19–28) were denied on December 22, 1936 (R. 29–32). The petition for a writ of certiorari was filed December 29, 1936, and was granted February 8, 1937.

(R. 32). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code and Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.[1]

QUESTIONS PRESENTED

1. Whether under Rules IX and XIII of the Criminal Appeals Rules a bill of exceptions filed on November 2, 1936, was filed within the time prescribed by an order of the trial court extending the time for filing such bill to and including November 1, 1936, which was a Sunday.

2. Whether a trial judge has the power under Rule IX of the Criminal Appeals Rules to extend the time for settling and filing a bill of exceptions by an order not entered within thirty days after the taking of the appeal.[1a]

3. Whether the Circuit Court of Appeals has the power under Rules IV and IX of the Criminal Appeals Rules to modify a timely order by a trial judge extending the time for settling and filing the the bill of exceptions by extending the length of the extension.[1a]

4. Whether, where a trial judge has directed the settling and filing of a bill of exceptions which does not comply with the requirements of Rule IX

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[1] As these rules are referred to in the brief for the petitioner as the "Criminal Appeals Rules", they are for convenience so referred to herein.

[1a] While these questions are not discussed in petitioner's brief on the merits, they were considered at length in the petition for writ of certiorari (pp. 20–23).

of the Criminal Appeals Rules and Rule 8 of the General Rules of this Court as to condensation and narration of the evidence, the Circuit Court of Appeals has the discretionary power under paragraph four of Rule IX of the Criminal Appeals Rules, after the time for settling and filing the bill of exceptions has expired, to allow the condensation and narration to be made and filed in that court, or to remit the transcript of record to the trial court for the purpose of permitting such condensation and narration.

5. Whether, assuming that the Circuit Court of Appeals has such power, it abused its discretion in the instant case by dismissing the appeal for want of narration and condensation of the evidence contained in the bill of exceptions.

STATEMENT

On June 26, 1936, the petitioner was convicted on the verdict of a jury, along with other defendants, for a violation of the mail fraud and conspiracy statutes (R. 4). On June 29 he was sentenced (R. 5), and on June 30 he filed a notice of appeal (R. 6). On July 27, by order of the trial judge, his time for filing and serving his assignment of errors and bill of exceptions was extended "to and including the 1st day of November, 1936" (R. 15).

In the latter part of September, 1936, 600 pages of the 4,000 page stenographer's transcript had been condensed, and by the middle of October a total of 1,600 pages had been condensed (R. 21). On

October 20, petitioner applied to the trial judge for a further order extending the time within which to settle and file the bill of exceptions. Upon suggestion by Government counsel that the trial court had no jurisdiction to make further extension (R. 21) petitioner, apparently convinced of the validity of this position (R. 21–22), did not pursue the matter further, and no order granting or denying the extension was ever entered (R. 17).

On October 22, 1936, the petitioner secured from Judge Manton of the Circuit Court of Appeals for the Second Circuit an order to show cause why an extension should not be granted by the Circuit Court of Appeals (R. 17). On October 27 the motion was argued and the relief sought denied (R. 17). On October 29, 1936, a motion to settle the stenographer's minutes as a bill of exceptions was argued before the trial judge and denied by him, the Government appearing in opposition (R. 17–18). On October 30, the trial judge in an informal conference agreed to receive another application to settle the transcript as a bill of exceptions if colloquy of counsel appearing therein was stricken. On Monday, November 2, a motion was made and granted to settle and file the typewritten minutes as a bill of exceptions, petitioner having in the meantime stricken therefrom with a red pencil the colloquy of counsel. (R. 18.) On November 16, 1936, the Government moved in the Circuit Court of Appeals to docket and dismiss the appeal upon the ground that the petitioner had failed to docket the

case in that court in time and because the bill of exceptions was not settled in compliance with Rule IX, Criminal Appeals Rules (R. 11). The accompanying affidavit stated that the bill of exceptions was ineffective because not in condensed and narrative form and because it had been allowed and settled out of time (R. 14). Thereafter, on December 4, 1936, the Circuit Court of Appeals, without opinion, entered an order dismissing the appeal (R. 18). On December 9 petitioner filed an application for rehearing. (R. 19–28.) That petition was presented *ex parte* without notice to the Government, and no copy of such petition was ever served on the Government counsel. (See Government's Brief in Opposition, p. 3). Petitioner's motion for reargument was denied in a unanimous opinion by the Circuit Court of Appeals, in which it denied the motion to amend the record and granted the motion to dismiss the appeal. (R. 29–32.)

The Circuit Court of Appeals rested its decision principally upon the ground that since Rule IX of the Criminal Appeals Rules imposes a time limit upon the settlement of the bill of exceptions which cannot be enlarged, and since under Rule 8 of the General Rules a bill of exceptions must be reduced to narrative form, there had not been compliance by the appellant with these rules and that the appeal would therefore have to be dismissed. (R. 31.) It stated, in addition, that the appellant had had four months within which to prepare a proper bill

of exceptions and had offered no sufficient excuse for his delinquency (R. 31). The Circuit Court of Appeals passed over the Government's contention that the bill of exceptions had been filed one day late under the order of extension of July 27, stating merely that if the bill had been sufficient its settlement on the day after Sunday would be in compliance with the Criminal Appeals Rules. (R. 30.)

RULES INVOLVED

The pertinent portions of the Criminal Appeals Rules of this Court are as follows:

> IV. *Control by Appellate Court.*—The clerk of the trial court shall immediately forward the duplicate notice of appeal to the clerk of the appellate court, together with a statement from the docket entries in the case substantially as provided in the form hereto annexed.
>
> From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.
>
> The appellate court may at any time, upon five (5) days' notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail.

IX. *Bill of Exceptions.*—In cases other than those described in Rule VIII, the appellant, within thirty (30) days after the taking of the appeal, or within such further time as within said period of thirty days may be fixed by the trial judge, shall procure to be settled, and shall file with the clerk of the court in which the case was tried, a bill of exceptions setting forth the proceedings upon which the appellant wishes to rely in addition to those shown by the clerk's record as described in Rule VIII. Within the same time, the appellant shall file with the clerk of the trial court an assignment of the errors of which appellant complains. The bill of exceptions shall be settled by the trial judge as promptly as possible, and he shall give no extension of time that is not required in the interest of justice.

Bills of exceptions shall conform to the provisions of Rule 8 of the Rules of the Supreme Court of the United States.

Upon the filing of the bill of exceptions and assignment of errors, the clerk of the trial court shall forthwith transmit them, together with such matters of record as are pertinent to the appeal, with his certificate, to the clerk of the appellate court, and the papers so forwarded shall constitute the record on appeal.

The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or reduction of the record filed with the

appellate court and may issue such directions to the trial court, or trial judge, in relation thereto, as may be appropriate.

XIII. In the foregoing rules, the phrase "trial court" shall be deemed to refer to the District Courts of the United States and the Supreme Court of the District of Columbia; the phrase "trial judge" includes the judge before whom the case was tried or brought to judgment and, in case of his absence from the district, or disability, or death, any other judge assigned to hold, or holding, the court in which the case was tried or brought to judgment; the phrase "appellate court" shall be deemed to refer to the United States Circuit Court of Appeals and the Court of Appeals of the District of Columbia.

For the purpose of computing time as specified in the foregoing rules, Sundays and legal holidays (whether under Federal law or under the law of the State where the case was brought) shall be excluded.

Rule 8, paragraph 2, of the General Rules of this Court reads as follows:

2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth

otherwise. See Equity Rule 75b, 226 U. S. Appendix, p. 23, as amended, 286 U. S. 570.

SUMMARY OF ARGUMENT

1. By order of the trial judge the time for settling and filing the bill of exceptions was extended "to and including the first day of November, 1936". The so-called bill of exceptions was settled and filed on November 2, and was therefore not within the time allowed by the trial judge. There is no occasion to apply Rule XIII of the Criminal Appeals Rules, which is a rule for "computing time". No computation of time is necessary where the extension is to a specific date, as distinguished from a term or a number of days. The bill was, therefore, not timely filed.

2. While there is nothing in the record which squarely presents the question, the trial judge does not have the power under Rule IX to extend the time for settling and filing a bill of exceptions unless the order of extension is made within thirty days after the taking of the appeal. This has been the only question presented in three recent cases in which this Court has denied certiorari. See *Spero* v. *United States*, 85 F. (2d) 134 (C. C. A. 8th), certiorari denied Nov. 23, 1936 (No. 466); *Wolpa* v. *United States*, 84 F. (2d) 829 (C. C. A. 8th), certiorari denied Jan. 4, 1937 (Nos. 586, 587); *Cary* v. *United States*, 86 F. (2d) 461 (C. C. A. 9th), certiorari denied Feb. 8, 1937 (Nos. 592, 593).

3. The Circuit Court of Appeals has no power under Rule IX or Rule IV of the Criminal Appeals Rules to modify a timely order by the trial judge extending the time for settling and filing the bill of exceptions by extending the length of the extension. The settlement of the bill of exceptions is expressly confided to the trial court by the first paragraph of Rule IX. While the Circuit Court of Appeals may, in the exercise of its supervisory and appellate control under the above-mentioned rules, correct a record so that it will reflect the proceedings in the District Court by adding papers not certified by the clerk or by striking out some which may not be necessary, it may not usurp the function committed to the trial judge. For the Circuit Court of Appeals to permit the filing of a bill of exceptions beyond the time allowed by Rule IX would be a direct usurpation of a function of the trial judge. Settlement of the bill of exceptions is inherently and historically an act of the trial judge. The Criminal Appeals Rules impose upon this act time limitations. No such limitations are placed upon the Circuit Court of Appeals, and if the petitioner's contention is correct, the time limitations contained in the rules may be completely circumvented.

4. Where, as here, a bill of exceptions does not comply with the requirements of Rule IX of the Criminal Appeals Rules and Rule 8 of the General Rules of the Court as to condensation and narration

of the evidence, the Circuit Court of Appeals has no power under paragraph 4 of Rule IX of the Criminal Appeals Rules, after the time for settling and filing the bill of exceptions has expired, to allow the condensation and narration to be made and filed in that court or to remit the transcript of record to the trial court for the purpose of permitting such condensation and narration. The transcript of the stenographer's minutes is not in any sense a bill of exceptions. Under the rules the trial judge alone may settle and file a bill of exceptions. The Circuit Court of Appeals has no power to usurp the trial judge's function and defeat the object of the condensation rule by rearranging, after the time for filing has expired, the transcript of stenographer's minutes so as to constitute it a bill of exceptions. The case of *Barber Asphalt Company* v. *Standard Asphalt and Rubber Company,* 275 U. S. 372, is not controlling. That was an equity case, and in equity cases such a remission for compliance with Rule 75 is possible, since even the indefinite time limitations for filing a condensed record which prevailed prior to the Criminal Appeals Rules were not applicable in equity cases.

5. Even if it be assumed that the Circuit Court of Appeals has the power to remit the bill of exceptions to the trial court for condensation and narration, or to permit condensation and narration to be made in the Circuit Court of Appeals, it did not abuse its discretion in the instant case by dismissing the appeal for want of such con-

densation and narration. The special circumstances which this Court felt justified it in ordering a remission in the *Barber Asphalt Company* case are not present in the instant case. In that case the Circuit Court of Appeals had been uniformly indulgent concerning compliance with Equity Rule 75, requiring condensation. It had been the common practice to direct that all testimony be reproduced in the words of the witnesses. Then, for the first time, the rule was enforced in the *Barber Asphalt Company* case. This Court ruled that this was too severe a penalty to impose for action which had had the lower court's implied sanction for a long period of years up to that time.

In the instant case no effort was made by the petitioner to condense any of the testimony until approximately three months after the appeal had been noted, and yet by his own admission it would have been possible for him to have condensed the record at approximately five hundred pages a day. The bill of exceptions in this case was four thousand pages long, and the Circuit Court of Appeals correctly concluded that the petitioner had offered "insufficient excuses for his delinquency." There was, therefore, no abuse of discretion.

The action of the Circuit Court of Appeals in dismissing the appeal without having before it the assignment of errors was clearly justified in the absence of a showing by petitioner that there were assignments going to errors on the record proper.

ARGUMENT

I

A BILL OF EXCEPTIONS FILED ON NOVEMBER 2, 1936, IS NOT FILED WITHIN THE TIME PRESCRIBED BY AN ORDER OF THE TRIAL COURT EXTENDING THE TIME FOR FILING SUCH BILL TO AND INCLUDING NOVEMBER 1, 1936, NOTWITHSTANDING NOVEMBER 1, 1936, FELL ON A SUNDAY

The order signed by the trial judge on July 27, 1936, extended the time within which to settle and file the bill of exceptions and the assignment of errors "to and including the first day of November, 1936". (R. 16–17.) The first day of November fell on a Sunday. The Government consequently urged in its affidavit accompanying the motion to docket and dismiss the appeal (R. 13–14) that the trial judge was without power on November 2, 1936 (a Monday), to sign the bill of exceptions inasmuch as the time had expired on the previous day. The Circuit Court of Appeals, however, in its opinion (R. 30) refused to dismiss the appeal on this ground alone because of the provision of Rule XIII of the Criminal Appeals Rules (*supra*, p. 8) excluding Sundays and holidays for the purpose of computing time as specified in such rules.

We submit that this holding of the Circuit Court of Appeals was erroneous for two reasons: (A) Rule XIII, excluding Sundays and holidays, expressly refers to the *computation* of time as specified in the rules and does not permit an inference

that such Sundays or holidays are to be excluded where no computation of time is necessary or proper to ascertain the last date permitted for the doing of the required act; (B) It has never been the rule in the Federal courts, where the last day for settling and filing a bill of exceptions falls on a Sunday, that the act required may be done on the following day.

Rule XIII of the Criminal Appeals Rules provides that "For the purpose of computing time as specified in the foregoing rules, Sundays and legal holidays (whether under Federal law or under the law of the State where the case was brought) shall be excluded". It will be observed that the exclusion of Sundays and legal holidays was to be made only where it was necessary "for the purpose of *computing time as specified in the foregoing rules.*" Thus, Rule II requires that motions for new trial or motions in arrest of judgment shall be made within three days after verdict or finding of guilt. Rule III requires that an appeal be taken within five days after entry of judgment or order denying motion for new trial. Rule IX requires the bill of exceptions to be settled and filed "within thirty (30) days after the taking of the appeal, or within such further time as within said period of thirty days may be fixed by the trial judge * * *". And Rule XI requires that a petition for a writ of certiorari shall be filed in this Court within thirty

days after entry of judgment in the court below. It is evident that under these and other provisions of the Criminal Appeals Rules the computation of time becomes necessary and Rule XIII is therefore applicable.

In the instant case there was no necessity for computing time. A specific date was fixed in the order of the trial judge. The situation is, therefore, unlike that in which the order provides that the act to be performed must be done within a period or term, such as within thirty days or sixty days. If Rule XIII has any application to the order here in question it must operate to exclude all intervening Sundays and holidays and to advance the final date for settling the bill of exceptions to approximately November 17, 1936. This startling result was clearly not within the contemplation of either the court or petitioner's counsel, and does violence to the clear, unambiguous language of the order. Unless some other rule intervenes, the plain terms of the order required the settlement of the petitioner's bill of exceptions on or before November 1, 1936, and not thereafter.

Rule XIII is thus unlike certain state statutes [2] which provide that the time within which an act shall be done shall be computed by excluding the

[2] Calif. Civil Code, Sec. 3266c; Ill. Rev. Stat., c. 98, Sec. 216; c. 100, Sec. 6; c. 131, Sec. 1, subd. 11; Mo. Rev. Stat., c. 45, Art. II, Sec. 4160; Consolidated Laws of N. Y., c. 39, Art. 2, Sec. 5.

first day and including the last day but if the last day be a Sunday it shall be excluded.

It may be conceded that if there were any Federal statutes like these or any rule of this Court of similar purport, the petitioner's contention in the instant case would be valid. In the absence of any such provision of Federal law or rule, it seems obvious that the rule established by such state statutes cannot be helpful in deciding the case at bar.

A review of the applicable Federal cases discloses no decisions which sustain the petitioner's contention. These decisions were all rendered prior to the effective date of the Criminal Appeals Rules. By far the greater number of these decisions involve periods of time stated in days or months, the last day of which term fell on a Sunday or legal holiday. These cases have uniformly held that in the computation of time permitted for the taking of an appeal or the filing of a bill of exceptions the last day was not to be excluded because it happened to be a Sunday or legal holiday. *Johnson* v. *Meyers,* 54 Fed. 417 (C. C. A. 8th); *Meyer* v. *Hot Springs Imp. Co.,* 169 Fed. 628 (C. C. A. 9th); *Siegelschiffer* v. *Penn Mutual Life Insurance Co.,* 248 Fed. 226 (C. C. A. 2d); *Covey* v. *Williamson,* 286 Fed. 459 (App. D. C., 1923); *Chicago M. & St. P. Ry. Co.* v. *Leverents,* 19 F. (2d) 915 (C. C. A. 8th); *Northwestern Publice Service Company* v. *Pfeifer,* 36 F. (2d) 5

(C. C. A. 8th). See also *Gotham Can Co.* v. *United States,* 281 U. S. 706. In other words, the act required to be done must be performed within the term allotted, and not thereafter, despite the fact that the concluding day of the period was a Sunday or legal holiday.

These decisions do not deal with exactly the situation here involved. In the instant case the time for filing was set by an order fixing a certain date. Cases involving this point are extremely rare. In the case of *Maresca* v. *United States,* 277 Fed. 727 (C. C. A. 2d), certiorari denied, 257 U. S. 657, the order of the trial court extending the time for filing a bill of exceptions was in the form of an oral statement by the trial judge. It was not clear whether the order was one extending the term until November 1, or whether it was an extension for four months. The Circuit Court of Appeals said in its opinion (p. 732):

> Where time is defined by a particular date as well as by the number of days, and the two are inconsistent, it is very doubtful at the best whether the number of days named can overcome the particular date specified.

The court held that whether the court below extended the term to November 1, or whether it extended it four months, which would have brought it to November 2, which fell on a legal holiday, in either event the subsequent extension of the term, not made until the following day, came too late and

the bill of exceptions thereafter signed must be disregarded.

Support for the principle enunciated in the *Maresco* case is found in the convincing language of the Supreme Court of Massachusetts in the case of *Cooney* v. *Burt*, 123 Mass. 579, in which it was said:

> The question presented does not depend upon the rules which govern the computation of time when the last of a certain number of days allowed by statute or by general rule of court happen to fall on a Sunday or other legal holiday; but upon the construction of the special order made by the judge in this case, which did not define the time by the number of days, but by a particular date, and, as stated in his certificate, was that "the time for filing and presentment of these exceptions was extended by the court to April 12," and clearly did not allow them to be presented to him after that day. [Citing authorities.] *Exceptions dismissed.*

Petitioner strongly relies upon the decision of this Court in *Taylor* v. *United States*, 286 U. S. 1, 4–5. The facts of the *Taylor* case distinguish it from the case at bar. There, as this Court notes on page four of its opinion, the facts surrounding the preparation and signing of the bill were not in dispute. Petitioner's counsel duly lodged it with the United States Attorney. For convenience of the latter's office there were extensions of time to

May 17. On May 16, the Assistant District Attorney, having just completed examination of the bill, went with petitioner's counsel to the judge's chambers to secure his signature. Failing to find him, they agreed to ask his signature on Monday, May 18. On that day, with the express approval of all parties and in pursuance of the earlier agreement, the judge signed the bill.

In holding that the bill of exceptions settled under such exceptional circumstances might be considered as incorporated in the record, this Court used the following significant language:

> In these exceptional circumstances—the facts being undisputed—we think the petitioner is entitled to the benefit of the bill. *And negativing any intent to relax the general rule,* we accept it as adequate and properly incorporated in the record. See *Waldron* v. *Waldron,* 156 U. S. 361, 378. [Italics supplied.]

Furthermore, the *Taylor* case must be read in the light of the rules of court existing at the time that the case was decided, which rules recognized the right of the trial judge to control the time for settling the bill of exceptions by extending the term as many times as he deemed necessary for that purpose. The intolerable delays in criminal proceedings resulting from such extensions of time moved this Court to promulgate Rule IX, the purpose of which was to restrict the virtually unlimited discretion of the trial judge and the indefiniteness of

the time which had existed under the prior practice with reference to the preparation and settlement of bills of exceptions.

II

THE TRIAL JUDGE DOES NOT HAVE POWER UNDER RULE IX OF THE CRIMINAL APPEALS RULES TO EXTEND THE TIME FOR SETTLING AND FILING A BILL OF EXCEPTIONS BY AN ORDER NOT ENTERED WITHIN 30 DAYS AFTER THE TAKING OF THE APPEAL

Petitioner urges (Pet. pp. 20, 21) that this Court settle the question whether the trial judge has power to grant an extension of time for filing and settling the bill of exceptions when such extension is not granted within thirty days after taking the appeal. Petitioner asserts that the Circuit Court of Appeals ruled that the trial judge has no such power.

It is submitted that no such ruling appears in the opinion of the Circuit Court of Appeals. It is further submitted that on the record the question is not now before the Court. Everything in the record indicates that, whatever intention petitioner may have had to seek an application for extension of time from the trial judge, petitioner nevertheless abandoned any effort to secure such extension. The affidavit of petitioner (R. 17) states:

> Upon investigation I ascertained that there were decided cases, in other circuits, construing Supreme Court Rule IX in

criminal cases, holding that a further extension could not be granted under the circumstances of my case. The order allowed by Judge Patterson was, therefore, not entered.

There is therefore nothing in the record which presents this question—a question which has nevertheless been uniformly[1] resolved against petitioner's contention. See *Spero* v. *United States,* 85 F. (2d) 134 (C. C. A. 8th), certiorari denied Nov. 23, 1936 (No. 466, present term); *Wolpa* v. *United States,* 84 F. (2d) 829 (C. C. A. 8th), certiorari denied Jan. 4, 1937 (Nos. 586, 587, present term); *Cary v. United States,* 86 F. (2d) 461 (C. C. A. 9th), certiorari denied Feb. 8, 1937 (Nos. 592, 593, present term); *Yep* v. *United States,* 81 F. (2d) 637 (C. C. A. 10th); *Gallagher* v. *United States,* 82 F. (2d) 721 (C. C. A. 8th); *Cusamano* v. *United States,* 85 F. (2d) 132 (C. C. A. 8th); *Slade* v. *United States,* 85 F. (2d) 786 (C. C. A. 10th). See also *United States* v. *Adamowicz,* 82 F. (2d) 288, certiorari denied, 298 U. S. 664.

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[1] The case of *Fierman* v. *United States,* 84 F. (2d) 968 (C. C. A. 3d), is not, as petitioner urges, in conflict with these decisions. While dicta in that case suggest a contrary holding, the decision is simply that the trial judge may not extend the time for settling and filing the bill of exceptions in a case where seven days had elapsed since the time at which, by an order of extension, the bill was due to be filed.

III

THE CIRCUIT COURT OF APPEALS HAS NO POWER UNDER RULE IX AND RULE IV OF THE CRIMINAL APPEALS RULES TO MODIFY A TIMELY ORDER BY THE TRIAL JUDGE EXTENDING THE TIME FOR SETTLING AND FILING THE BILL OF EXCEPTIONS BY EXTENDING THE LENGTH OF THE EXTENSION

Rule IX expressly vests in "the trial judge" the power to fix the time at which, subject to the specific limitations in the rule, the bill of exceptions must be settled and filed. The text of the rule is clear. *In United States* v. *Adamowicz,* 82 F. (2d) 288 (C. C. A. 2d) certiorari denied, 298 U. S. 664, the Circuit Court of Appeals for the Second Circuit said:

> It is true that the appellants got a series of orders from a judge of *this court* ex parte, extending their time "to file and serve" their bill of exceptions * * * But rule 9 (28 U. S. C. A. following section 723a) prescribes that it must be settled "within thirty days after the taking of the appeal, or within such further time as within said period of thirty (30) days may be fixed by *the trial judge*". The "trial judge" means the judge who tried the case, "or in case of his absence from the district, or disability, or death, any other judge assigned to hold, or holding, the court in which the case was tried." * * * Judge Moskowitz was not at any time absent or disabled so far as appears, and *only he* had the power to extend the time. [Italics in lines 2 and 17 supplied.]

Likewise, in *Wolpa* v. *United States*, 84 F. (2d) 829, certiorari denied Jan. 4, 1937 (Nos. 586, 587, present term), the court said, referring to Rule IX:

> The rule has the same force and effect as federal statutes [citing cases], and neither *this court* nor the District Court has power to alter or amend it. (Italics supplied.)

Despite the clear language of Rule IX, petitioner nevertheless insists (Pet. pp. 21–23) that the Circuit Court of Appeals by Rule IV of the Criminal Appeals Rules is given power to modify the trial judge's order of extension by extending the length of the extension. Rule IV provides in part as follows:

> From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, *subject to these rules,* have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.
>
> The appellate court may at any time, upon five (5) days notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail. [Italics supplied.]

Rule IV, on its face, is a general rule relating to the supervision and control of proceedings on appeal, but the extent of the control is expressly

made "subject to these rules". The nature of the control which the Circuit Court of Appeals shall exercise with reference to the "record on appeal" which is the specific subject matter here involved, is described in the last paragraph of Rule IX, which provides as follows:

> The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or reduction of the record filed with the appellate court, and may issue such directions to the trial court, or trial judge, in relation thereto, as may be appropriate.

But the settlement of a bill of exceptions is expressly confided to the trial judge by the first paragraph of Rule IX. And *his* power is severely limited in several respects. *He* may not give *any* extension of time "that is not required in the interest of justice". And at all events "the appellant, within thirty (30) days after the taking of the appeal, or within such further time as within said period of thirty days *may be fixed by the trial judge,* shall procure to be settled, and shall file with the clerk of *the court in which the case was tried,* a bill of exceptions * * *" (italics supplied). Such bill of exceptions "*shall conform* to the provisions of Rule 8 of the Rules of the Supreme Court of the United States" (italics supplied).

It is clear that under Rules IV and IX the Circuit Court of Appeals has the power, as the court below pointed out (R. 31), to correct a record so

that it will properly reflect the proceedings in the District Court, by adding papers not certified by the clerk or striking out some which may not be necessary. The Circuit Court of Appeals could, under Rule IV or Rule IX, order the inclusion of the indictment, assignment of errors, notice of appeal, motions, orders, or other matters constituting the record proper, where any such have been omitted from the transcript of the record on appeal. It may even be conceded that under Rules IV and IX the Circuit Court of Appeals could require the elaboration of a bill of exceptions where such bill of exceptions had been timely filed and had been reduced to condensed and narrative form in accordance with the Rules of this Court. Thus the Circuit Court of Appeals might desire that certain portions of a timely bill of exceptions, settled in narrative form, be restated in question and answer form. In such a case the Circuit Court of Appeals would be exercising its supervisory appellate control on a matter as to which there had already been compliance in the trial court with the Criminal Appeals Rules. In such a case the Circuit Court of Appeals would not be usurping the function committed to the trial judge by the first paragraph of Rule IX.

It is significant that petitioner can point to no case, either before or after the Criminal Appeals Rules, in which the power of the Circuit Court of Appeals to extend the time in which the bill of exceptions shall be settled and filed is recognized.

The interpretation of the rules here insisted upon by the Government is in accordance with the well-recognized principle that the settling of a bill of exceptions is inherently and historically the personal act of the trial judge.

IV

THE CIRCUIT COURT OF APPEALS HAS NO POWER UNDER PARAGRAPH 4 OF RULE IX OF THE CRIMINAL APPEALS RULES, AFTER THE TIME FOR SETTLING AND FILING THE BILL OF EXCEPTIONS HAS EXPIRED, TO ALLOW THE CONDENSATION AND NARRATION TO BE MADE AND FILED IN THAT COURT, OR TO REMIT THE TRANSCRIPT OF RECORD TO THE TRIAL COURT FOR THE PURPOSE OF PERMITTING SUCH CONDENSATION AND NARRATION

Paragraph 2 of Rule IX of the Criminal Appeals Rules requires that bills of exceptions shall conform to the provisions of Rule 8 of the general Rules of this Court. Rule 8 provides with reference to bills of exceptions that "such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise".

In *Gallagher* v. *United States*, 82 F. (2d) 721, 722 (C. C. A. 8th), the court said:

> The object and purpose of the grant of power by the Congress to the Supreme Court to make the rules, and the purpose and intent of the rules themselves, were to expedite the hearing of criminal cases on appeal, and in our opinion it is the plain duty of the courts to enforce these rules. For if this

duty is not done by the courts, the passage of the statute and the adoption of the rules will have been vain and futile acts.

The requirement with reference to narration and condensation was the result of a long and painful experience by appellate courts in reviewing records which often consisted of thousands of pages of testimony. See *McNamara* v. *Cerf*, 4 F. (2d) 997, (C. C. A. 2d); *Allen Gasoline Co.* v. *Franklin Fire Ins. Co. of Philadelphia*, 65 F. (2d) 609 (C. C. A. 9th); *Rosen* v. *United States*, 271 Fed. 651, (C. C. A. 2d); *Fraina* v. *United States*, 255 Fed. 28, (C. C. A. 2d); *Chicago* v. *LeMoyne*, 119 Fed. 662, (C. C. A. 7th); *Linn* v. *United States*, 251 Fed. 476, (C. C. A. 2d).

This case is a typical illustration of the abuse which the court rules were designed to correct. The bill of exceptions approved by the trial judge consisted of 3981 pages (R. 16).

It is the Government's position that the Circuit Court of Appeals has no power to circumvent the requirement of Rule 8. The petitioner does not contend that it is within the discretion of the Circuit Court of Appeals to review a record of which the bill of exceptions is not reduced to narrative form. It is his contention that the Circuit Court of Appeals has the power to order such record reduced to narrative form or to remit the bill to the trial court for such reduction. If this power of the Circuit Court of Appeals be conceded, the adoption

of the rule relating to condensation will have been a vain and futile act. For, while the trial court under the Criminal Appeals Rules has placed upon it definite time limitations within which a bill of exceptions in condensed and narrative form must be settled, there are no such limitations on the Circuit Courts of Appeals. While the court below recognized that in exceptional circumstances in equity cases the record could be remitted by the appellate court to the trial court for narration and condensation, it pointed out that under the Criminal Appeals Rules such a practice was not permitted, since these rules impose a time limit for the settlement of the bill of exceptions which cannot be enlarged.

Prior to the Criminal Appeals Rules there was no specific time limit upon the power of the trial court to allow and settle a bill of exceptions. As the petitioner admits (Pet. p. 25), formerly the trial judge might allow and settle a bill of exceptions at any time within the term of court at which the judgment was rendered, and the term of court might be extended indefinitely for that purpose by an order of the court or even by a standing rule or consent of the parties. Doubtless the delays resulting from this practice were largely responsible for the time limitations fixed in Rule IX of the Criminal Appeals Rules.

The only case pointed to by the petitioner in which the power of the Circuit Court of Appeals to remit the record for purposes of reduction is ad-

mitted is *Barber Asphalt Co.* v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, an equity case. But, as petitioner admits (Pet. pp. 25, 26), definite time limits are not observed in equity cases. In the *Barber Asphalt Company* case, the court said at page 385:

> The second matter is that the term of the District Court at which the decree was entered expired shortly thereafter without any reservation of further time for settling a statement of the evidence. This, it is said, put an end to the district court's power to act under the equity rule [Equity Rule 75]. We think otherwise. Power to act under that rule is not confined to the term at which the decree is rendered, nor to a period allowed during that term. Such a restriction was not recognized in the early practice and is not expressed in the rule. Other rules, such as 69 and 72, show that where a restriction of that nature is intended it is expressed.

The *Barber Asphalt Company* case is, therefore, not authority for the power of the Circuit Court of Appeals to remit a transcript for narration and condensation where the bill of exceptions must be filed within a certain time and that time has lapsed.

Equity Rule 69, referred to in the *Barber Asphalt Company* case, provides that no rehearing shall be granted "after the term at which the final decree of the court shall have been entered and

recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court." And Equity Rule 72 provides that "Clerical mistakes in decrees * * * may, at any time before the close of the term at which final decree is rendered, be corrected by order of the court * * *".

Under the Criminal Appeals Rules a time limit somewhat analogous to, although perhaps even more specific than, those contained in Equity Rules 69 and 72, is definitely fixed by Rule IX, which fixes the time in which the bill of exceptions must be settled and filed. Even prior to the Criminal Appeals Rules it was the ordinary practice of the Circuit Courts of Appeals to refuse to consider a case where the so-called bill of exceptions consisted entirely of a literal transcript of all the proceedings at the trial. See, for example, the cases in the Tenth Circuit of *Davis* v. *United States,* 38 F. (2d) 631; *Smith* v. *United States,* 38 F. (2d) 632; *Flowers* v. *United States,* 38 F. (2d) 633; *Imrie* v. *United States,* 38 F. (2d) 634; *Oldham* v. *United States,* 38 F. (2d) 634; *McShann* v. *United States,* 38 F. (2d) 635.

The Act of February 24, 1933, c. 119, 47 Stat. 904, U. S. C., Title 28, Section 723 (a), vested in this Court authority to prescribe, from time to time, rules of practice and procedure with respect

to proceedings in criminal cases after verdict and further provided that this Court "may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force".

It will be noted that this statute for the first time delegated to the Court authority to enact rules inconsistent with statute. Prior to that time the statute (U. S. C., Title 28, Section 723) expressly restricted the power of the courts, including the Supreme Court, to make rules for proceedings in equity and admiralty, by the condition that they should not be inconsistent with the laws of the United States. It will further be noted that by the Act of June 19, 1934, U. S. C., Title 28, Section 723 (b), 723 (c), this Court is now given power with respect to rules in actions at law and cases in equity which seems equally as broad as the power to prescribe rules for criminal cases after verdict. In other words, the laws in conflict with the new rules are of no further force and effect.

The case of *Barber Asphalt Co.* v. *Standard Co.*, 275 U. S. 372, was decided under Equity Rule 75b, which was promulgated in 1912 by virtue of the authority of R. S., Secs. 913, 917 (U. S. C., Title 28, Secs. 723, 730). The Court, at page 386, notes that:

> * * * The requirement respecting condensation and narration was not drawn

> from the earlier practice but was new. Its enforcement was slowly approached. For a time transgression was indulgently overlooked. Then this Court and some of the Circuit Courts of Appeals, having called special attention to the requirement, began to give effect to it. The Court of Appeals for the Seventh Circuit continued to be uniformly indulgent until it came to decide this case.

In that case this Court held that in view of the indulgence theretofore extended to litigants in ignoring the requirement of Equity Rule 75b, it was an abuse of discretion on the part of the Circuit Court of Appeals to impose the severe penalty of affirmance in view of the particular situation in that circuit and in view of the particular facts of that case. That rule was and is a mere rule of court. Its promulgation had no effect to amend or repeal existing statutes since by the statute authorizing it, it was not permitted to contravene the laws of the United States.

But a rule of the Court which has by statute the effect of superseding, amending, or repealing statutory law should, it seems, be of the same grade and dignity as the statute. It therefore follows that the Circuit Court of Appeals is without power to disregard the provisions of such a rule.

There has been a uniform tendency on the part of the trial courts and Circuit Courts of Appeals to regard the Criminal Appeals Rules as having

the binding force and effect of statutes. This view would permit no substantial departure from the requirements of any particular rule.

It must be noted that the Criminal Appeals Rules have received much more prompt acceptance than did the equity rules involved in the *Barber Asphalt* case. In that case fifteen years after the promulgation of the rule it was customarily disregarded in at least one circuit. The Criminal Appeals Rules effective on September 1, 1934, have since that time uniformly been accepted by the courts as meaning what they said. No case has been presented in which the Circuit Court of Appeals has shown any disposition or desire to relax the requirements of the rules. It would be most unfortunate if any such desire or tendency appeared.

The transcript of the stenographer's minutes filed in this case was not a bill of exceptions under the requirements of Rule 8 of the General Rules of this Court. The matter therefore becomes jurisdictional, and in view of the requirements of the Criminal Appeals Rules, which clearly indicate that the trial judge and the trial judge alone may settle and file the bill of exceptions, the Circuit Court of Appeals has no power to usurp the trial judge's function; defeat the object of the rule, which was to secure a speedy disposition of criminal cases; and rearrange the transcript of the stenographer's minutes so as to constitute it a bill of exceptions.

V

ASSUMING THAT THE CIRCUIT COURT OF APPEALS HAS THE POWER DISCUSSED IN THE PRECEDING POINT, IT DID NOT ABUSE ITS DISCRETION IN THE INSTANT CASE BY DISMISSING THE APPEAL FOR WANT OF NARRATION AND CONDENSATION OF THE EVIDENCE CONTAINED IN THE BILL OF EXCEPTIONS

It is clear from the language of the opinion below that the court was of the opinion that, even though it had the power to order the bill of exceptions reduced to condensed and narrative form, the exercise of such a power in the instant case would not be justified. The court states (R. 31):

> This appellant had four months and has offered insufficient exeuses for his delinquency.

Petitioner insists that the action of the Circuit Court of Appeals constituted a patent abuse of discretion, and in this connection relies upon *Barber Asphalt Co.* v. *Standard Asphalt and Rubber Co., supra.* In that case this Court held that the refusal of the Circuit Court of Appeals to remit the transcript in order to have it reduced to narrative form was an abuse of its discretion. The reason for the decision, however, is made plain by the language of the Court at page 386, where it said:

> We come then to the circumstances bearing on the question of discretion. The rule was promulgated in 1912. The requirement respecting condensation and narration was not drawn from the earlier practice but was

> new. Its enforcement was slowly approached. For a time transgression was indulgently overlooked. * * * The Court of Appeals for the Seventh Circuit continued to be uniformly indulgent until it came to decide this case. There may have been some scolding before, but not in the court's opinions. It was a common practice in that circuit for the judges, circuit as well as district, to direct that all the testimony be reproduced in the words of the witnesses. In so directing in this case the district court followed that practice. Of course the practice was in contravention of the equity rule and the Court of Appeals was right in giving effect to the rule by declining to examine the mass of evidence wrongly reproduced. But the court did not stop there. It also affirmed the decree, because of the transgression—and this notwithstanding the transgression was largely due to its own course of action. That was a very severe penalty to impose for action which had the court's implied sanction up to that time. * * * When the particular situation in the Seventh Circuit is considered, we think it is apparent that the Court of Appeals passed the bounds of a sound discretion in affirming the decree. * * *.

In this case we have an entirely different situation. In the Second Circuit, not only has there been "some scolding before", but that scolding has been "in the court's opinions." See *Linn* v. *United States,* 251 Fed. 476; *Fraina* v. *United*

States, 255 Fed. 28; *Rosen* v. *United States,* 271 Fed. 651; *McNamara* v. *Cerf,* 4 F. (2d) 997; *Ulmer* v. *United States,* 266 Fed. 176.

In *Fraina* v. *United States, supra,* the court said (p. 30):

> There is no bill of exceptions. Both parties have agreed to call what is properly a transcript of the stenographer's minutes by that name; but giving it the requisite name does not make it the lawful thing. The consent is worthless, and it is of grace only that we consider the points argued. On this matter we spoke plainly in *Linn* v. *United States,* 251 F. 476.

In *McNamara* v. *Cerf, supra,* the court said (p. 998):

> What is called a bill of exceptions in this record requires some notice. It is 118 printed pages long, of which at least 30 are wholly superfluous, in that they consist of colloquies between counsel—doubtless once important, but of no use on appeal. The remainder is in question and answer, although the legal result in several instances was that plaintiff offered certain testimony, which the court rejected. It seems to be necessary to remind the bar that rulings such as we made in *Radford* v. *United States,* 129 F. 49, 63 C. C. A. 491, and *Linn* v. *United States,* 251 F. 476, 483, 163 C. C. A. 470, have never been overruled or abandoned. We have examined this bill of grace, and not of right. We would be justified in declining to consider the errors assigned.

Petitioner urges as a reason why the Circuit Court of Appeals should have exercised its discretion in this case that when, on October 27, a hearing was had on his motion for an extension and such other relief as might be proper (R. 23), certain members of the Circuit Court of Appeals informally suggested that they were without power to grant a further extension of time within which to settle and file the bill of exceptions, and suggested that he request the trial court to settle the typewritten minutes of the trial as the bill of exceptions and thereafter apply to the Circuit Court of Appeals for time to print a condensed record under Rule IX.

It should be pointed out that there is nothing in the record, other than that portion of the petition for rehearing (R. 23), from which may be made to appear what transpired before the Circuit Court of Appeals on the motion or what order was made, if any, by that court. No copy of the affidavit and petition for rehearing was served upon the Government, and Government counsel were therefore without an opportunity to controvert the statements contained in the affidavit. Even though the statement (R. 23) of petitioner in his affidavit be taken as an accurate recital of what transpired at the informal hearing on the motion, the most that can be said is that the suggestion of the Circuit Court of Appeals could hardly be taken as an order to the petitioner to follow a certain

course of action with reference to the perfection of his appeal. Perhaps the better interpretation to be placed upon the remarks of the Circuit Judges is that they were at most a suggestion as to a possible way out for a litigant who had been careless.

In an attempt to show that he was prejudiced by this suggestion of the Circuit Court of Appeals, petitioner attaches an affidavit to his petition for writ of certiorari (Pet. p. 37) in which petitioner's counsel states that "on October 27, 1936, when the Circuit Court of Appeals suggested the procedure finally adopted, it was stated to that court, in response to its question, that so far as the petitioner was concerned a narration and condensation for settlement could be completed within the time still remaining". (Pet. p. 39.) This constitutes a frank admission on the petitioner's part that the testimony could have been reduced to narrative form in the time remaining (five days, including Sunday). The significance of this assertion cannot be overestimated. The statement is in almost direct contradiction to that submitted by petitioner in an affidavit dated November 16 in opposition to the motion to docket and dismiss the appeal (R. 17), wherein it is said:

> Realizing that I was virtually out of court if further time was not obtained, I immediately sought relief in the Circuit Court of Appeals.

And again in his petition for rehearing (R. 22), he stated:

> Your petitioner thus [October 20] found it impossible to condense the record within the time allowed * * *

If the affidavit accompanying the petition (p. 39) reflects accurately what transpired in the Circuit Court of Appeals, why was it necessary to apply to that court for this extraordinary relief? If the Circuit Court of Appeals was informed that a condensation and narration might be effected within the five days between October 26 and November 1, why would it have suggested, as petitioner asserts, that petitioner settle his bill in question and answer form and thereafter apply for time to condense the record?

The transcript of testimony comprised about 4,000 pages (R. 19). Convicted on June 27, the petitioner had condensed but 600 pages by the latter part of September (R. 21). By the middle of October a total of 1,600 pages had been condensed. It does not appear that any further condensation ever took place. Thus, there remained to be condensed on October 26, 2,400 pages of testimony, exclusive of exhibits. If, therefore, as petitioner asserts, he could have condensed in five remaining days (including Sunday) the 2,400 pages of testimony, the finding of the Circuit Court of Appeals (R. 31) that "Appellant had four months and has offered insufficient excuses for his delin-

quency" is particularly convincing. The action of the Circuit Court of Appeals was fully justified and did not constitute in any sense an abuse of discretion.

The petitioner urges also (Pet. pp. 17–20; Br. pp. 24–25) that the action of the Circuit Court of Appeals in dismissing the appeal rather than in striking the bill of exceptions was erroneous since the Circuit Court of Appeals did not have before it an assignment of error and, therefore, was not in a position to determine whether there were errors on the record proper which would require the Circuit Court of Appeals to hear and determine the appeal even in the absence of a bill of exceptions.

Certainly if there had been any such assignments of errors it would appear to have been the duty of the petitioner to have called them to the attention of the Circuit Court of Appeals. So far as appears from the opinion of that court, as well as the various affidavits on behalf of the petitioner appearing in the transcript of record, there is nothing to indicate any assignment going to error on the record proper. Petitioner disavows any suggestion that there were in fact assignments of that character. (Br. p. 12, note.) In the absence of any showing that the petitioner was prejudiced by the action of the Circuit Court of Appeals in dismissing the appeal without the assignment of errors before it, it would not seem that this Court would be justified in reversing the judgment of the Circuit Court of Appeals on this ground.

CONCLUSION

For the reasons hereinbefore stated we respectfully submit that the judgment below should be affirmed.

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